

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

(Union City, CA)

JATCO, INCORPORATED
Employer

and

Case 32-RC-4911

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, DISTRICT 190, LOCAL
LODGE NO. 1584

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, including the parties' briefs and arguments made at the hearing, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer is a California corporation with a facility and principal office located in Union City, California, where it is engaged in the manufacture and nonretail sale of plastic consumer goods. During the past 12 months, the

Employer sold products valued in excess of \$50,000 directly to customers located outside the State of California. In such circumstances, I find the assertion of jurisdiction appropriate herein.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

4. Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Petitioner seeks to represent all full-time and regular part-time production and maintenance employees, shipping and receiving employees, tool and die employees, and quality control employees employed by the Employer and performing work at the Employer's facility. Petitioner also seeks to represent all full-time and regular part-time production and maintenance employees, shipping and receiving employees, tool and die employees, and quality control employees performing work at the Employer's facility who are provided by temporary placement or employment agencies, excluding all managerial and administrative employees, office clerical employees, and all other employees, guards, and supervisors as defined by the Act.¹ Contrary to Petitioner, the Employer contends that the unit should not include employees

¹ The petitioned-for unit appears as amended by Petitioner at hearing. It was not entirely clear until near the conclusion of the hearing that Petitioner was seeking to represent employees of the Quality Control department; the Union had initially indicated on the record that the unit would not include quality control employees. The Employer did not specifically oppose the inclusion of quality control employees in the unit at that time, but instead noted the possible need for the parties to submit additional evidence on this point. However, each of the parties subsequently informed the Hearing Officer that they did not wish to present any further evidence on this issue, and the hearing was subsequently closed. In view of the above and the fact that the Employer did not raise the quality control employees issue in its post-hearing brief, I conclude that the Employer does not oppose the inclusion of quality control employees in the unit. I also note that the quality control employees work at the same Employer facility as the other employees in the petitioned for unit and that all of the Employer's employees are subject to the extensive rules and benefits provided for in the Jatco Employee Handbook, including hours of work, vacations, holidays, breaks, insurance benefits, etc. I also note that the Jatco Employee Handbook, in a section entitled "Quality Control, " states that molding and secondary operators are responsible for the quality of their machines, and that employees experiencing problems or questions regarding quality should alert their team leader/molding technician, and this language supports the conclusion that there is functional integration between the quality control and other

currently provided to it by temporary service or employment service agencies, that it and the temporary agencies do not constitute joint employers of the employees supplied to the Employer (user employer) by any of the temporary agencies (supplier employer), and indeed that the Employer is not an employer of the temporary employees (supplied employees) at all. The Employer does not dispute, however, that a community of interest exists among its permanent, non-supplied employees in its production, maintenance, shipping and receiving, and tool and die departments.

The Employer manufactures, assembles and distributes plastic components to various industry groups. Paul Appelblom is the President of the Employer, with an office at the Union City facility. General Manager Steven Jones reports to Appelblom. The Employer employs in excess of approximately 200 employees at its Union City facility, which is comprised of two buildings. While production and maintenance work occur in both buildings, the press machines are confined to one building, while the other building is generally used for warehousing, distribution and other secondary operations. The Employer has the following departments, each of which has its own manager: production, maintenance, shipping and receiving, quality control, tool and die, materials and accounting. The production and maintenance managers are Jeff Jensen² and Rafael Zapien,³ the shipping and receiving manager is Ricardo Bedolla, the quality control manager is Pat Martinez, the tool and die manager is Craig Holland, and the materials manager is Eric Appelblom, all of whom report to General Manager Jones. Beneath the president, general manager, and department managers in the Employer hierarchy are molding

employees in the petitioned for unit. In light of the above described evidence, and the fact that no party is opposing the inclusion of the quality control employees, I have included them in the unit.

² Mr. Jensen is incorrectly referred to as Jack Jensen in the transcript.

³ Mr. Zapien's first name is incorrectly spelled as Raphael in the transcript.

technicians in the production department.⁴ Among the molding technicians are Jaime Carranza, Miguel Rodriguez, Mike Albarak, and Vinod Kumar.⁵ The molding technicians and department managers work predominantly on the plant floor.

While the numbers fluctuate somewhat from week to week, the Employer employs about 75 to 78 of its own employees and also uses approximately 125 “temporary” employees who are supplied to it by as many as 5 different employment agencies: Takher Incorporated (“Takher”), Spectrum, TSU, Staffing Network, or Trend/Tec. The employees provided by these agencies are primarily entry level production employees.⁶ At least one supplier employer (Takher) provides

4 No party has asserted that the molding technicians are statutory supervisors within the meaning of Section 2(11) of the Act. I note, however, that Employer witnesses, in a conclusionary fashion, testified that the molding technicians effectively recommend the rewarding and promotion of employees and have the authority to assign and direct work and to discipline or effectively recommend discipline. No examples of the exercise of this purported authority were introduced into the record, and thus, even assuming that the molding technicians have this purported authority, there is insufficient evidence to establish the degree of discretion the molding technician’s exercise in such matters. I also note that the Employee Handbook reflects that molding technicians are expected to handle quality control problems, authorize overtime, verify and initial time sheets, and receive employee sick calls. However, there is also record evidence that suggests that overtime may be authorized only by department managers, the general manager, or the company president. No testimony was adduced as to how overtime policies have been administered in practice. The molding technicians do not themselves determine staffing needs, but instead simply respond to information provided by the manager of the production department or production planning manager, Kim Marez. Marez directly conveys to the temporary agencies the number of supplied employees the Employer needs, with the molding technicians then simply ensuring that the number of employees specified by Marez actually show up. There is no evidence that molding technicians establish or set priorities, and it instead appears they at most announce or implement priorities established by the department managers, general manager, or president. The foregoing reflects that the testimony as to the molding technicians’ supervisory status was largely conclusionary, and did not adequately establish that the molding technicians exercised a sufficient amount of discretion in taking these actions to warrant a finding that they are supervisors as defined in Section 2(11) of the Act. SDI Operating Partnerships, L.P. Harding Glass Division, 321 NLRB 111 (1996). Therefore, as the molding technicians are an integral part of the production process, and I have concluded that they are not statutory supervisors, I will include the molding technicians in the unit.

⁵ There was testimony that there are three to four additional molding technicians, for a total of seven to eight, but the names of the other molding technicians are not in the record.

⁶ While the employees who testified all worked in the production department, there was testimony from the Employer’s President that supplied employees also perform warehousing and shipping and receiving functions. Further, the Employer’s General Manager Jones testified that there were employees supplied by Takher working in every department.

two on-site supervisors (Mercedes _____ and Guadalupe or “Lupe” _____)⁷ who work at the Employer’s facility.⁸

It is the position of the Employer that the Board must engage in a “two-pronged” analysis before it may approve the petitioned-for unit. First, the Employer states that the Board must find that the Employer and its suppliers are joint employers of the employees in this case, and once that is established, the Board must further find that there is a sufficient community of interest among the “permanent” employees of the Employer and those employees supplied to the Employer by temporary agencies. See M.B. Sturgis, 331 NLRB No. 173 (2000). The Employer denies that it and the temporary agencies constitute joint employers of the employees working at the Employer’s facility, and indeed denies that the Employer is “an employer” of the supplied employees at all within the meaning of the statute. Contrary to the Employer, for the reasons set forth below, I conclude that I need not decide whether the Employer and the temporary agencies are joint employers, and I find that the Employer is an employer of the employees supplied to it by the supplier employers.

In situations where an employer employs its own employees and uses temporary employees provided by a supplier employer, a union may file an RC petition with the Board seeking an election covering both the employees of the employer and the employees of the supplier employer who are employed at the employer’s facility. M.B. Sturgis, Inc., 331 NLRB No. 173 (2000). If, in its RC petition, the union names both employers as the employers of the employees in the petitioned for unit, and thus that both companies would have an obligation to bargain with the union if it won the Board election, then the Board will not order an election

⁷ The last names of these two individuals are not evident in the record.

⁸ It is not clear from the record that Mercedes _____ and/or Lupe _____ have their own “office” at the Employer’s facility, insofar as Employer General Manager Jones described their work station only as a “table.” This table is located near the back of the Employer’s production area, not in an area of other managerial offices.

unless it finds that the employer and the temporary employee agency are joint employers and that the employees in the petitioned for unit share a sufficient community of interest. Here, however, the Union only seeks a finding that Jatco, Incorporated is the employer of its own employees and an employer of the employees provided to Jatco, Incorporated by the supplier employers that provide it with temporary employees. The Union is not seeking a finding of the employer status of the supplier employers supplying Jatco, Incorporated with temporary employees and is not seeking to impose a bargaining obligation on those entities. In these circumstances, it is not necessary to determine that the Employer and the temporary employee agencies are joint employers; rather, it is only necessary to determine whether the Employer is a statutory employer of its own employees and the employees of the supplier employers who perform work at the Employer's facility. Outokumpu Copper Franklin, Inc., 334 NLRB No. 39 (2001); Interstate Warehousing of Ohio, LLC, 333 NLRB No. 83 (2001); and Professional Facilities Management, Inc., 332 NLRB No. 40 (2000).

In pre-Sturgis cases, the Board typically would find that an employer was a statutory employer if it employed employees, and then would consider whether the employer met one of the Board's discretionary standards for asserting jurisdiction. Delta Health Center, Inc., 310 NLRB 26 (1993). Here, unlike the pre-Sturgis statutory employer cases, it is also necessary to establish that the Employer is a statutory employer of the employees of the supplier employers.⁹ In the post Sturgis cases evaluating whether a "user" employer is an employer of temporary employees provided by a supplier employer, the Board considers whether the "user" employer has any meaningful control over some of the terms and conditions of employment of the temporary employees. See Interstate Warehousing of Ohio, LLC, 333 NLRB No. 83, slip op. at

⁹ The Employer in the present case has stipulated that it satisfies the applicable Board commerce standard.

6 (2001) (user employer found to be statutory employer where it supervised, directed, and disciplined temporary employees and converted many temporary employees to permanent employment). While the Board relied upon these factors in Interstate Warehousing, it does not appear that any single factor is essential to a finding of statutory employer status. The expectation of conversion to permanent employment in Interstate Warehousing, for example, was absent in Professional Facilities Management, in which the user employer had no permanent solely employed employees. Professional Facilities Management, Inc., 332 NLRB No. 40 (2000). When the user employer has meaningful control over terms and conditions of employment of the supplied employees, then meaningful bargaining can take place. Professional Facilities Management, slip op. at 2.

Here the evidence amply supports the conclusion that the Employer is a statutory employer of the supplied employees. With respect to disciplining and terminating the employment of supplied employees, it is undisputed that the Employer has the power to send supplied employees home for unsatisfactory work or other misconduct, and to ask that such employees not be permitted to return to the Employer. It is also clear that the Employer requires the supplied employees and its own employees to meet the Employer's quality control standards. Similarly, Employer witness and General Manager Jones stated that "[w]e inform Takher of what our rules are, and it's up to them to enforce them," which strongly suggests the application of the Employer's rules to its supplied employees.¹⁰ However, unlike its own employees, the supplied employees are not covered by the Employer's progressive discipline system and thus the Employer has absolute discretion in deciding when and why to send an employee home and

¹⁰ I do not rely upon the anecdote in Petitioner's brief regarding the alleged disciplining of Takher-supplied employee Joel Balderas by the Employer's supervisors, as this incident occurred after the closure of the hearing in this case and does not constitute record evidence.

/or to direct the a supplier employer to no longer send an employee to work at the Employer's facility. There is no evidence in the record that Takher or any other supplier has ever failed or refused to abide by a request from the Employer that a particular employee not be supplied in the future. Although it is the Employer's preferred practice to have Takher's Mercedes _____ or Guadalupe _____ inform an employee of the Employer's decision to send the employee home and/or not have the employee return, the Employer is not contractually required to do so, and in fact has directly informed employees of such decisions.

I also find that the Employer provides supervision and direction to the supplied employees. It appears from the record that the Takher on-site "supervisors," Mercedes _____ and Guadalupe _____, engage primarily in ministerial administrative tasks, and that their role with respect to supervisory decisions is merely to communicate to employees those decisions already made by the Employer.¹¹ There is no evidence in the record that Mercedes _____ or Guadalupe _____ specifically, or Takher, or any other supplier employer, ever disciplined or discharged any employee without having been instructed to do so by the Employer. Nor is there evidence that Mercedes _____ or Guadalupe _____ review the quality of the work of any Takher employees, or that they are regularly on the plant floor in any evaluative capacity. On the contrary, employees testified that they rarely see the Takher "supervisors"¹² and that their production errors would be observed by molding technicians such as Miguel Rodriguez or Mike Albarak, not by Mercedes _____ or Guadalupe _____. Similarly, Takher-

¹¹ The evidence indicates that the other supplier employers do not have on-site supervisors.

¹² Takher-supplied employees Joel Balderas, Benito Caballero, and Agustin Hernandez all testified that they generally see Mercedes _____ and Guadalupe _____ only when they picks up their paychecks.

supplied employees Balderas and Hernandez each testified that they would report any problems in production or with a co-worker to a molding technician, such as Miguel Rodriguez or Jaime Carranza, rather than to an on-site Takher supervisor. Finally, while the record evidence with respect to the procedure by which time sheets were verified was somewhat unclear, the time sheets for Takher-supplied employees introduced into the record consistently bore the signatures of the Employer's molding technicians such as Miguel Rodriguez, Jaime Carranza or Mike Albarak, with none bearing the signatures of Takher "supervisors" Mercedes _____ or Guadalupe _____. Employer General Manager Jones testified that he would approve Takher invoices for payment upon verifying the signature on the time sheets by the Employer's molding technician or department head; there is no indication that Jones looked for or required any signature or other form of verification from the Takher "supervisors."

The molding technicians and department managers employed by the Employer are primarily responsible for directing and monitoring the work of the supplied employees. The molding technicians inform the supplied employees of which presses to work on, ensure that the presses are running, and that employees are present at their presses. The molding technicians also engage in "further training" of the supplied employees. While there is no record evidence that the Employer prepares formal performance evaluations of its supplied employees, it is undisputed that the Employer retains the right to have its suppliers refrain from providing particular employees and that the only individuals who are regularly in the work areas observing the work performed by the supplied employees are the molding technicians and the department managers.

The Employer also determines which shifts the supplied employees will work, and it determines the break and lunch schedules and the amount of overtime that the supplied employees

will be given. I also note that it in situations such as this, where the Employer maintains the right to reject and send home supplied employees who are deemed to be unsatisfactory, it inherently maintains an effective control over the qualifications that supplied employees must have, and thereby has a significant impact on the hiring standards set by the supplier employers. Similarly, the Employer inherently has an indirect, but significant, impact on the wages/benefits that the supplied employees will receive. Although it is the supplier employers who set the wages and benefits of the supplied employees, the Employer pays the suppliers the cost of supplied employee wages plus a premium, and the amount paid to the supplier employers is subject to regular re-negotiations because there is no written contract setting such terms.¹³

Based on the above stated factors, I find that the Employer has meaningful control over several of the essential terms and conditions of employment of the supplied employees, and that the Employer is therefore an employer of the supplied employees within the meaning of the Act.¹⁴

Per M.B. Sturgis, supra, there is no consent requirement for units that combine jointly employed and solely employed employees of a single user employer. Therefore, given that the

¹³ The Employer pays Takher a 40% surcharge on what Takher pays its employees as an hourly wage. For example, if a Takher-supplied employee receives \$10/hour from Takher, the Employer will pay Takher \$14/hour for that employee. This 40% surcharge is intended to cover Takher's overhead or other expenditures, including workers compensation costs.

¹⁴ In arguing that it is not the employer of the supplied employees, the Employer also makes much of the fact that there is no written contract between it and Takher with respect to Takher's provision of employees. The record is silent as to whether the Employer has written contracts with any of its other suppliers. I note that the absence of a written contract in no way precludes a finding of joint employer status. See, e.g., Lodgian, Inc. d/b/a Holiday Inn City Center, 332 NLRB No. 128, slip. op. at 3-4 (2000).

Employer does not dispute that a community of interest exists among its permanent, non-supplied

employees in its production and maintenance, shipping and receiving, and tool and die departments, and that it has not chosen to pursue the position that its permanent, non-supplied quality control employees lack a community of interest with its production and maintenance, shipping and receiving, and tool and die employees, the only remaining issue presented is whether the agency-supplied employees share a community of interest with the Employer's permanent employees in the petitioned-for unit such that they should be included in the unit.¹⁵

Section 9(a) of the National Labor Relations Act provides “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment....” 29 U.S.C. Section 159(a). In making a determination as to whether a petitioned for unit is appropriate, the Board has held that Section 9(a) of the Act only requires that the unit sought by the petitioning union be an appropriate unit for purposes of collective bargaining. Nothing in the statute requires that the unit be the only appropriate unit or the most appropriate unit. See Morand Brothers Beverage Co., 91 NLRB 409, 418 (1950); National Cash Register Co., 166 NLRB 173, 174 (1966); Dezcon, Inc., 295 NLRB 109, 111 (1989) (the Board need only select an appropriate unit, not the most appropriate

¹⁵ The Employer predicts dire consequences with respect to bargaining stability should the petitioned-for unit be approved. However, the Board does not consider such speculative or potential bargaining difficulties that may arise from such a situation. Interstate Warehousing of Ohio, 333 NLRB No. 83, slip op. at 1 (2001). Thus, the Petitioner's failure to include Takher or any other supplier employer as an employer or joint employer on the petition does not invalidate the petition. Professional Facilities Management, Inc., *supra*, slip op. at 2 (2000); Interstate Warehousing of Ohio, *supra*, slip op. at 2. I also find the Employer's reliance upon Engineered Storage Products Co., 334 NLRB No. 138 (2001) to be misplaced. In that case, unlike here, the petitioner union did not seek to include in the petitioned-for unit the employees supplied to the user employer by temporary agencies.

unit). Also, a plant-wide single location unit, such as that requested by Petitioner herein, is presumptively appropriate. Hegins Corp., 255 NLRB 160 (1981); Penn Color, Inc., 249 NLRB 1117, 1119 (1980).

The “appropriate unit” issue in this case is whether the temporaries--supplied by various supplier employers to the Employer--may be included in a unit with the Employer's solely employed employees. This analysis is governed by M.B. Sturgis, supra, and its progeny, which require traditional community of interest factors to be applied. In the instant case, as discussed in detail in the following paragraphs, the common working conditions between the regular employees and the supplied employees are sufficient to warrant the inclusion of the supplied employees in the unit found appropriate. The Employer in its brief, notes that there are certain aspects in which the Employer's regular and supplied employees have dissimilar terms and conditions of employment. The temporaries are ineligible for certain Employer benefits, receive their paychecks from the supplier agencies, may be subject to the disciplinary or personnel rules of the supplier agencies to which permanent employees are not subject, and do not receive their own Employer-issued tool packs as do the permanent employees. However, these dissimilar terms and conditions of employment are substantially outweighed by the many common terms and conditions of employment the supplied employees share with the Employer's regular employees. As noted above, the supplied employees work side-by-side with regular employees, they largely perform the same work functions, are held to the same work quality standards, punch the same time clock, work the same shifts, and are subject to a significant degree of common supervision by the department managers, and the routine direction from molding technicians. As noted in Sturgis itself, “[u]nder Section 9(b) of our statute, a group of an employer's employees working side by side at the same facility, under the same supervision, and

under common working conditions, is likely to share a sufficient community of interest to constitute *an* appropriate unit.” Sturgis, supra, slip op. at 9 (2000). I find that description to be applicable in the present circumstances.

In applying a community of interest test, the Board analyzes bargaining history, functional integration, employee interchange, employee skills, work performed, common supervision and similarity in wages, hours, benefits and other terms and conditions of employment. See J.C. Penney Co., 328 NLRB No. 105 (1999); and Armco, Inc., 271 NLRB 350, 351 (1984). More specifically, the Board weighs the following community of interest factors:

[A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs. . .; the infrequency or lack of contact with other employees; lack of integration with other employees; lack of integration with work functions of other employees or interchange with them; and the history of bargaining.

Overnite Transportation Company, 322 NLRB 723, 724 (1996), citing Kalamazoo Paper Box Corporation, 136 NLRB 134, 137 (1962). No one of the above factors has controlling weight and there are no *per se* rules to include or exclude any classification of employees in any unit. Airco, Inc., 273 NLRB 348 (1984). Furthermore, the test for determining the eligibility of individuals designated as “temporary” employees is whether they have an uncertain tenure, and under Board precedent, an employee is not considered to be a “temporary” employee unless a definite termination was established at the time of their hire. See Quality Chemical, Inc., 324 NLRB 328 (1997); and U.S. Aluminum Corp., 305 NLRB 719 (1991).

Here, employees supplied to the Employer by supplier employers are not informed that the work for the Employer will necessarily lead to permanent employment with the Employer. Conversely, there is no evidence that any employees have been apprised of any definite termination date for their employment. There is evidence in the record that a number of employees have had long-term employment at the Employer's facility and that several employees have obtained permanent employment with the Employer after initially being supplied by a supplier employer, particularly in the production department.¹⁶ While Takher-supplied employees must satisfy a minimum hours requirement with Takher prior to obtaining regular permanent employment with the Employer, neither the Employer nor Takher has any prohibition on supplied employees becoming permanent employees.

It is also clear that the supplied employees make up a substantial portion of the Employer's work force. For example, Guillermina Uribe, a current permanent employee who formerly had been a supplied employee, testified that approximately 15 to 20 of the approximately 26 persons working on her afternoon shift in the production department were supplied by temporary agencies. Similarly, supplied employee Joel Balderas testified that of the employees working with him on the 7:00 a.m. to 3:30 p.m. shift, approximately 4 or 5 of the 10 to 11 employees are permanent employees with the remainder being supplied by supplier employers. When Balderas has worked the 11:00 p.m. to 7:30 a.m. shift, approximately 6 of the 12 to 15 employees on that shift were permanent employees, with the remainder being supplied by supplier employers. General Manager Jones testified that, during the period immediately preceding the August 2001 hearing in this case, of the 27 to 28 employees working per shift, 12

¹⁶ The only department in which it appears that no employee initially supplied by a supplier employer has been converted to a permanent regular employee of the Employer is the tool and die department. General Manager Jones testified that approximately 6 persons converted from supplied temporaries to non-supplied permanent employees in the 6 months prior to the August 2001 hearing in this matter.

to 15 employees were supplied by Takher.¹⁷ He also testified that on any given day as many as 50% of the employees working might be supplied by Takher.

The Employer's permanent employees are paid biweekly, whereas supplied employees, or at least those supplied by Takher, are paid weekly. The Employer's tool and die employees receive anywhere from \$13-30 per hour, and the Employer's maintenance employees receive anywhere from \$15-30 per hour. The record does not disclose the salary ranges for shipping and receiving and production employees.¹⁸

The Employer has five shifts (three primary shifts, i.e., day, night and graveyard, with two lesser shifts entailing fewer employees), and the temporaries, like their regular co-workers, are assigned to all of these shifts.¹⁹ The regular and temporary employees punch the same time clock upon starting and completing their shifts.²⁰

It is true that permanent employees and "temporary" supplied employees receive different employment benefits. Permanent employees are entitled to participate in the Employer's health insurance program, retirement plan, life insurance plan, vacation plan, and disability insurance plan, while supplied employees do not participate in these plans.²¹ Further,

¹⁷ More specifically, Jones indicated that there are 4 to 5 supplied employees in the shipping department, with approximately the same number of regular non-supplied employees in that department. He also stated that there are 4 regular non-supplied employees in the maintenance department, with supplied employee, and 5 regular non-supplied employees in the tool and die department, with one supplied employee.

¹⁸ Nor is it clear from the record whether more tool and die and maintenance employees are closer to the lower or higher ends of their respective salary ranges.

¹⁹ To the extent that shifts were modified in order to conserve energy costs during the California energy crisis in 2001, the shift changes applied to both regular and supplied employees.

²⁰ I do not find it material that the electronic time clock incorporates different "parameters" depending upon the information programmed into it by various temporary agencies, such that different paper reports are printed and submitted to temporary agencies. It is more important that the Employer is the undisputed sole lessee of the time clock, and that all employees punch this time clock whether or not they are "permanent" or supplied employees.

²¹ It is noteworthy, however, that newly hired "regular" employees are subject to a six month probationary period in which they are not eligible for benefits, which in part reflects a community of interest with respect to benefits between the supplied employees and the non-supplied probationary employees during this six month period. "Regular" employees are not eligible for the profit sharing plan until they have completed one year of work. Employer General Manager Jones also testified that the ultimate cost to the Employer of paying for a supplied employee and paying the wages and benefits to a non-supplied employee was approximately the same.

the Employer does not provide workers compensation coverage for its supplied employees but instead expects such coverage to be provided by the supplying agencies.

The issue of common or separate supervision has been addressed above in connection with the finding that the Employer is a statutory employer of the supplied employees. As noted, it appears that the department managers and molding technicians assign and direct the work of the supplied employees and also monitor the quality of the work performed by the supplied employees.²² As noted above, the evidence also establishes that the Employer retains the power to direct the supplier employers not to send the Employer employees who have failed to meet the Employer's quality standards.

Insofar as the power to discipline or require compliance with company rules bears on the issue of common or separate supervision, the evidence cited above establishes that the Employer requires the supplied employees to comply with the Employer's rules of employee conduct and that the Employer may send employees home for engaging in misconduct. There is also no evidence in the record that any Takher "supervisors" ever disciplined an employee working at the Employer's facility for breaching a purely Takher policy or rule. Because the evidence suggests that suppliers such as Takher merely acted as the communicators of, or enforcement mechanisms for, rules or policies created and required by the Employer, I find that there was at least some common supervision over the regular and supplied employees. Moreover, even though there may not be common supervision as to all aspects of the regular and supplied employees employment, that does not support the Employer's argument. See Texas Empire Pipe Line Co., 88 NLRB 631 n.2 (1950) (difference in supervision not per se basis for excluding

²² Further, the evidence reflects that the Employer's quality control personnel review all the quality of all the products made by the employees, without regard to whether the products were produced by regular or supplied employees.

employees from appropriate unit). Accord: Hotel Services Group, Inc., 328 NLRB No. 30 (1999).

The record reflects that both the “permanent” employees and the “temporaries” supplied by supplier employers are free to move about all areas of the Employer’s facility without restriction in order to perform their work.²³ Both regular and supplied employees utilize the same lunch or break rooms and restrooms. Regular and supplied employees work in both of the two buildings at the Employer’s premises. While regular employees are provided with their own tool packs and temporary employees use tools on an as needed basis, there is no indication that there is any material difference in the types of tools used by regular and supplied employees. Nor is there evidence that Takher, rather than the Employer, has ever provided tools to permanent or supplied employees.

There is also evidence in the record of the integration of regular and supplied employees and of their work functions. President Appelblom testified that temporary employees work side-by-side with regular employees and are integrated into all aspects of the workforce. The regular and temporary employees work in the same plant areas and are part of the same production operations. Appelblom stressed that employee flexibility is vital to an operation that is essentially a “job shop” in which there is no formal assembly line. The sheer number of supplied employees utilized by the Employer also inferentially supports their integration into the workforce. The manner in which an employer organizes its plant and utilizes the skills of its labor force has a direct bearing on the community of interest analysis and is an important consideration in any unit determination. Gustave Fischer, Inc., 256 NLRB 1069 n.5 (1981). As

²³ While there was testimony that supplied employees are free to leave the Employer’s premises during lunch or other breaks and that regular employees are not, this factor carries little weight. Moreover there is evidence showing that it is rare for either supplied employees to leave the Employer’s premises during breaks.

in Gustave Fischer, *supra* at 1073, the record in this case reflects a highly integrated operation “where the emphasis appears to be placed upon completing the task at hand, rather than upon the particular classification of employee involved,” characterized by flexibility, “underscored by the use of employees as needed.” The Employer’s own job descriptions further support a finding of integration and interchange in this case. In a job advertisement from an internet site for a machine operator position in the production department, the Employer described the position as entailing certain shipping/receiving duties (e.g., count and pack products for shipping) and unspecified “other duties”. In a job description for an assembler position in the production department, the Employer also includes “count and pack products for shipping” and “apply shipping/identification labels as required” as job functions. As such, I find that the integration of employees and work functions in this case supports the petitioned-for unit.²⁴ See also Interstate Warehousing of Ohio, 333 NLRB No. 83 (2001) (unit of solely employed and jointly employed employees appropriate where they share same job classifications, perform common work functions, and share common work hours and supervision).

The Employer offered testimony that Takher provided prior training to the employees it supplies in order to ensure that they are qualified for their positions upon commencing work for the Employer. However, no specific evidence of the nature or extent of such training was ever provided. Further, numerous employee witnesses offered apparent contrary testimony indicating that the training they received was generally on-the-job training received after starting work for the Employer, largely consisting of observation of employees operating various machinery, with

²⁴ The integration among departments is also supported by the memorandum to employees from General Manager Jones regarding the promotion to production manager of Rafael Zapien, in which it is indicated that notwithstanding his role in the production department, “he will help to direct/prioritize functions in support department such as materials, maintenance, tooling and shipping . . .”

one employee denying having received any training from Takher whatsoever.²⁵ Moreover, production and molding operator jobs were described as “entry level,” with the Employer not having an expectation of experience on the part of the employees, and the supplied employees were described as “basically unskilled.” There is no evidence in the record that any previous training for the production positions was required at all. As to on-the-job training of the supplied employees, it is evident that this was primarily provided by co-workers or the Employer’s supervisors, not by Takher or the on-site Takher “supervisors.”²⁶

There is no known bargaining history in the record, so this factor does not detract from my finding of a community of interest among the permanent and supplied employees in this case.

Based on the foregoing, I have concluded that the regular and supplied employees’ similarity of hours, job functions, frequency of contact, shared supervision and integration of work function all support a finding that the Employer’s permanent and supplied employees share a community of interest.

I therefore find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees, shipping and receiving employees, tool and die employees, and quality control employees employed by the Employer and performing work at the Employer’s Union City, California facility, including all full-time and regular part-time production and maintenance employees, shipping and receiving employees, tool and die employees, and quality control employees performing work at the

²⁵ The record is silent regarding the specifics of any training the temporary employees purportedly received from their supplier employers prior to performing work at the Employer.

²⁶ The Employer also argues that any community of interest finding regarding the regular employees and the supplied employees is undermined by the regular employees’ access to an e-mail system that is unavailable to the supplied employees. The record reflects only that the e-mail system is available to managerial employees, and not that it is necessarily available to “rank and file” employees of the type that would be included in the proposed unit. Given the uncertainty as to regular employee access to the e-mail system, access to the e-mail system does not serve as any basis to differentiate between the regular employees and the supplied employees.

Employer's Union City, California facility who are supplied by temporary placement or employment agencies; excluding all managerial and administrative employees, office clerical employees, all other employees, guards, and supervisors as defined by the Act.

There are in excess of approximately 200 employees in the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election²⁷ to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 190, LOCAL LODGE NO. 1584

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969); North Macon Health Care Facility, 315 NLRB 359, 361, fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be

²⁷ Please read the attached notice requiring that the election notices be posted at least three (3) days prior to the election.

filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, 1301 Clay Street, Suite 300 N, Oakland, California 94612-5211, on or before October 2, 2001. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by October 9, 2001.

DATED AT Oakland, California, this 25th day of September 2001.

James S. Scott
Regional Director
Region 32

32-1229

177-1650
177-8520
177-9325
362-6718
401-7500
420-7330
460-5067